Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1995

EDWIN P. WILSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Where the courts below erred in their summary dismissal of Petitioner's application for Writ of Error Coram Nobis by failing to grant the Petitioner an evidentiary hearing or by requiring responsive pleadings from the Respondent.

2. Whether the courts below erred in failing to grant Petitioner's application for Writ of Coram Nobis despite a showing by Petitioner, through documents obtained under the Freedom of Information Act, that the prosecution knowingly withheld exculpatory information establishing Petitioner's innocence.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit were Edwin P. Wilson, (Plaintiff-Appellant) and the United States of America (Defendant-Appellee).

The Petitioner before this Court is Edwin P. Wilson and the Respondent is the United States of America.

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Edwin P. Wilson, hereby respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the District Court is unpublished but is reprinted at Appendix ("App") 1. The final opinion of the District Court is reprinted at App. 3 .

JURISDICTION

The opinion and judgment of the Court of Appeals for the Eighth Circuit was entered on February 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. CONSTITUTION, Amendment V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time or War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Eastern District of Virginia in November, 1982 for violations of federal law relating to the illegal export of firearms. Following sentencing and direct appeal to the Fourth Circuit in 1983, Petitioner was resentenced to 10 years in prison. Petitioner has completed his sentence for this conviction, but remains incarcerated while serving sentences on other convictions.

This petition follows affirmance by the Fourth Circuit of a September, 1994 refusal by Senior Judge Richard L. Williams to grant Petitioner an application for Writ of Error Coram Nobis under the All Writs Statute, 28 U.S.C. 1651(a). Petitioner resorted to this remedy, rather than the more classic redress available under 28 U.S.C. 2255, because he had already completed his 10 year sentence.

Petitioner's request for a Writ of Error Coram Nobis is his second collateral attack on his conviction. In 1987, Petitioner filed an application for another Writ of Error Coram Nobis, but that application was converted by the District Court into a petition for relief under 28 U.S.C. 2255. That petition was ultimately denied and an appeal to the Fourth Circuit was rejected in 1990.

This second collateral appeal follows the successful completion of 4 Freedom of Information Act cases that Petitioner had pursued in the United States District Court for the District of Columbia, as follows:

1) Wilson v. U.S. Department of Justice, C.A. 87-2415. The records obtained in this case involved the Egyptian American Trading and Service Corporation (EATSCO), a company Wilson bankrolled for several former government officials.

2) Wilson v. Central Intelligence Agency, C.A. 89-3356. Wilson obtained records regarding his career and his convictions. They confirm his close relationship with former CIA associates after he left the agency in 1971.

3) Wilson v. Central Intelligence Agency, C.A. 91-0087. These records confirm Wilson's ongoing relationship with the CIA in efforts to advise that agency of an attempt by the Libyan government to obtain the plans for development of a nuclear device.

4) Wilson v. Internal Revenue Service, C.A. 94-0770. This action produced thousands of pages of Wilson's personal and business records in the files of the Internal Revenue Service that they had held since his arrest and never returned to him.

These records support Wilson's contention that he was denied access to exculpatory evidence which, in turn, denied him the chance to present a complete case supporting his "good faith/CIA" defense. The evidence to prove his innocence was there all along, he was just blocked from using it.

SUMMARY OF ARGUMENT

In 1982, Petitioner was convicted in the United States District Court for the Eastern District of Virginia for the illegal exportation of one rifle and four revolvers. In 1983, the Fourth Circuit vacated several of the original counts for which Petitioner was originally convicted and ordered him to be resentenced, see United States v. Wilson, 721 F2d. 967 (4th Cir. 1983). Petitioner was resentenced to ten years in prison on the remaining two counts.

In 1987, Petitioner filed an initial application for relief coram nobis, which was converted by District Judge Williams into an action under 28 U.S.C. 2255. In this action, Petitioner sought discovery and an evidentiary hearing, which was denied because Petitioner failed to produce "a smoking gun", i.e. he failed to produce any concrete document suggesting that the Government had withheld information from him. This denial was, in turn, affirmed by the Fourth Circuit, see United States v. Wilson, 901 F2d. 378 (4th Cir. 1990).

Beginning in 1987, Petitioner pursued four federal actions under the Freedom of Information Act, 5 U.S.C. 552, ("FOIA"), where he uncovered thousands of pages of records confirming his innocence. As a result, he initiated a second application for coram nobis relief, which was denied in September, 1994. It is this denial which forms the basis for this instant Petition.

In this Petition, Wilson contends that the courts below erred in summarily dismissing his coram nobis application, since the material obtained from his four FOIA suits without doubt shows that the Government knowingly withheld exculpatory material from him which would have aided him in making out a *prima facie* "CIA" or "good faith" defense.[1]

Coram nobis, rather than proceeding under 28 U.S.C. 2255, is the appropriate remedy herein because Wilson has completed his ten year sentence on his conviction in the Eastern District of Virginia. He seeks a remand to the District Court for the purpose of discovery, an evidentiary hearing and the ultimate reversal of his conviction.

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW GROSSLY ABUSED THEIR DISCRETION BY THEIR SUMMARY DISMISSAL OF PETITIONER'S APPLICATION FOR CORAM NOBIS RELIEF.

The District Court, in its opinion, dated September 21, 1994, justified its summary dismissal of Wilson's Petition for a Writ of Error Coram Nobis by finding it to be a

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[1]Wilson sought to prove at trial in 1982 that he was instructed by then-current CIA officials to seek out foreign sources of U.S. weapons. He, therefore, purchased the rifle and pistols in question to substantiate his "cover".

"complete rehash of issues decided by the Fourth Circuit in the direct appeal and issued ruled on by this court in the prior #2255 action." This decision was then affirmed by the Fourth Circuit, giving rise to this instant Petition. For the following reasons, the District Court was grossly in error and this matter should be remanded.

First, Wilson's current coram nobis application is supported by a substantial amount of corroborative, exculpatory material obtained under FOIA, while his prior appeals were not. His prior coram nobis action was predicated upon a strong, but unsubstantiated belief that the National Security Agency ("NSA") intercepted Wilson's communications between Libya and the U.S. While he provided some evidence to the District Court that NSA collected this type of information as part of its function, this alone was insufficient. Wilson's request to seek other evidence through discovery was denied. By contrast, Wilson here submitted a wealth of exculpatory material justifying relief, some of which was not even uncovered until 1994!

Second, Petitioner raises issues heretofore not raised on appeal. For example, Petitioner raised the specter that the prosecution knowingly withheld exculpatory information from him and presented documentation to support his allegation. Also, in the instant case, Petitioner raised for the first time his belief that he was entitled to raise an "entrapment by estoppel" defense.

Finally, it is obvious that the District Court's memory of the prior proceedings in the case have greatly diminished.

For example, Judge Williams noted in his order that Wilson's prior 28 U.S.C. 2255 action was never appealed. This is erroneous; the case was appealed, although unsuccessfully.

Clearly, the District Court gave little or no actual consideration to Wilson's instant application for coram nobis relief.

Rule 9(b) of the Federal Rules Governing Section 2255 Proceedings provides that:

> (b) Successive motions. A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

See United States v. Oliver, 865 F2d. 600 (4th Cir. 1989); Molina v. Rison, 866 F2d. 1124 (9th Cir. 1989).

Wilson should not be hobbled by his prior Section 2255 proceeding. Now, he has produced the "smoking gun" that the District Court said he lacked the last time around. Had the District Court carefully reviewed his application, it would have understood that.

II. THE COURTS BELOW ERRED IN REJECTING PETITIONER'S APPLICATION FOR CORAM NOBIS WHERE HE PRESENTED NEWLY DISCOVERED EVIDENCE THAT THE PROSECUTION KNOWINGLY WITHHELD EXCULPATORY EVIDENCE ESTABLISHING PETITIONER'S INNOCENCE.

A. THE PROSECUTION FAILED TO PROVIDE PETITIONER WITH IMPORTANT BRADY WHICH WAS EXCULPATORY AND COULD HAVE BEEN USED TO PROVE PETITIONER'S INNOCENCE AT TRIAL

This Court's landmark decision in Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215 (1963) established that the Government has an obligation to turn over to a defendant material in their possession which is favorable to the accused and which is "material either to guilt or punishment". (at 87) Later, in Agurs v. United States, 427 U.S. 97, 49 L.Ed.2d 342 (1976), the Brady test was refined by a finding that "A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial". Finally, in United States v. Bagley, 473 U.S. 667, 87 L.Ed.2d 481 (1985), the meaning of "materiality" was determined to oblige the production of exculpatory evidence "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." (at 682) See also, United States v. Rivalta, 925 F.2d 596 (2nd

Cir. 1991); Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992); Barrett v. United States, 965 F.2d 1184 (1st Cir. 1992).

As noted above, Petitioner used FOIA to collect literally thousands of pages of federal agency records related to his prior CIA career, his domestic and international business dealings, the Government's investigation of him and his conviction. Many of these records are exculpatory, reflect directly upon his guilt or innocence, are material to his defense and they should have been disclosed to him and to his counsel. Further, other records retained by federal agencies as exempt from release under FOIA, lead Petitioner to suppose that the CIA and other agencies continue to maintain other exculpatory information. While speculative, this belief supports Petitioner's request for an evidentiary hearing, along with discovery.

The records Wilson was able to obtain from the Government under FOIA make a very strong case for relief in this case. They include:

1) Grand Jury Testimony of Theodore Shackley. Mr. Shackley served as Associate Deputy Director of Operations for CIA during the mid-1970's, a position which gave him great authority to ask Petitioner to obtain weapons and information about weapons use in the Middle East. Petitioner had reason to rely upon Shackley's representations. This grand jury testimony reveals that Shackley authorized Wilson, while overseas, to conduct a search for international sources of Vietnam-era weapons,

such as M-16 rifles. This revelation is crucial to Wilson's "good faith" defense and is exculpatory.

2) Grand Jury Testimony of Peter Goulding As a former Wilson employee, Peter Goulding's grand jury testimony reflects that he was tasked by Thomas Clines, a Shackley protege, to obtain some Soviet military equipment. This information further supports Wilson's "good faith" defense and is exculpatory.

3) Interview Transcripts and Grand Jury Testimony of Paul Cyr This business of Wilson obtained the rifle which was to subject matter of Wilson's Alexandria conviction. These materials confirm that Cyr knew the rifle was an inoperative, demilitarized version of the M-16 (actually an AR-15). As such, this would annul one of the critical elements of the Government's case. It is unquestionably exculpatory, see United States v. Seven Misc. Firearms, 503 F.Supp. 565 (D.D.C. 1980) (de-militarized weapon not firearm within meaning of the National Firearm Act).

4) List of CIA Contact with Wilson In Wilson v. Central Intelligence Agency, C.A. 89-3356, (D.D.C. 1991), the Defendants prepared a Vaughn declaration which, in part, lists 63 instances after 1971 where a CIA employee made a written report of a business, professional or social contact with Wilson. In some cases, the report reflects that Wilson was tasked to perform an objective. In others, he was contacted as a source of information. This list of contacts stands in diametric opposition to the CIA's contention at trial that the CIA had no record of any

substantive contacts with Wilson after he left the CIA in 1971.

5) EATSCO material These records confirm that Wilson engaged in a post-1971 business venture (the Egyptian-American Transportation and Service Corp.) with several high ranking CIA and government officials (including Richard Secord) which is significant because it substantiates Wilson's claims that he met and discussed intelligence matters with high-ranking government officials.

6) Atomic Bomb Material Wilson intercepted material related to an attempt by Libya to arm itself with a nuclear device and forwarded it to CIA. It impacts upon Wilson's "good faith" defense and is exculpatory.

7) Quintero interviews Rafael "Chi Chi" Quintero was a Wilson business associate. Government agents interviewed Quintero on several occasions about Wilson's activities. These interview reports contain potentially exculpatory material and they disclose the Quintero reported back to the intelligence agencies on a regular basis. They could have led to the discovery of additional exculpatory material.

8) Somoza material These records describe a plan to assist the Somoza regime in Nicaragua with security, which Ted Shackley asked Wilson to perform because the U.S. political climate precluded direct CIA involvement. This reinforces Wilson's close contacts with CIA.

9) Canton-Raffio material Alex Raffio was an associate of John Canton, a CIA operative in Morocco. Wilson helped Raffio to prepare a threat analysis for the Moroccan government, to the ultimate benefit of the CIA.

10) Treasure Trove This material about Wilson's activities was surreptitiously spirited out of Libya by John Heath, a former Wilson employee and adverse witness. It confirms many Wilson efforts to assist the CIA.

11) Diane Lash letter These records confirm that a former CIA employee, Thomas Clines, removed information concerning Wilson from CIA files.

12) Rome Meeting Memoranda Wilson met with federal prosecutors in Italy prior to his arrest. At this time, he proffered information regarding actions he had taken to assist the CIA.

13) Barnes interviews Roberta Barnes was an employee of Wilson in London who was interviewed several times by the FBI. These interviews reveal and confirm her knowledge about Wilson's role in EATSCO, his contacts with the CIA and his efforts to dispatch intelligence back to the U.S.

14) Clines interviews This former CIA associate of Wilson was often used by Theodore Shackley as an intermediary when dealing with Wilson. Clines gave several interviews to the CIA General Counsel from 1976 to 1982. They confirm that Clines reported to CIA about Wilson's activities, plus details of EATSCO.

15) Kaiser Polygraph memorandum Earnest Kaiser lured Wilson out of Libya before his arrest. These records reflect that the Government was concerned about Kaiser's credibility and they contain evidence that Wilson did seek information about the return of captured General Dozier, which suggests Wilson's continuing efforts to assist the CIA and is exculpatory.

The information listed above was never provided to Wilson at the time of his trials, yet, for the reasons stated, it is exculpatory to him.

In the Fourth Circuit's prior opinion in United States v. Wilson, 721 F.2d 967 (4th Cir. 1983), at 974, the three judge panel concluded that the refusal of the District Court to grant Petitioner's request for a "good faith" instruction was permissible because "there was insufficient evidence to justify it". Only now, after the passage of thirteen years, has it become clear that the reason Wilson was unable to produce enough evidence was due to the prosecution's withholding of it from him,

B. THE FAILURE OF THE PROSECUTION TO TURN OVER EXCULPATORY BRADY MATERIAL TO PETITIONER WAS KNOWING AND EVIDENCES PROSECUTORIAL MISCONDUCT

At all four of Wilson's criminal trials, the prosecution portrayed Wilson to the courts and to the juries as a rogue former CIA agent who engaged in a variety of nefarious

schemes solely for his own benefit and that he had never been tasked by CIA or any of its employees to undertake any projects on behalf of the Agency.

For example, during legal argument at Wilson's trial in Alexandria over proposed jury instructions, Assistant U.S. Attorney Theodore Greenburg urged the trial judge to reject Wilson's proposed "good faith" defense instruction because:

> A suggestion that there was some CIA involvement here upon which there is either apparent authority or some reason which Mr. Wilson could believe that he was acting for or on behalf of the Central Intelligence Agency is nothing but a fanciful red herring. There is absolutely no inference here, there is no evidence in the case they have put on which suggests that there was any involvement with the CIA. (emphasis added) (Trial Transcript at 430)

In fact, there was a bushel of evidence, such as the records noted above, suggesting that Wilson had regular contacts with the CIA. However, the Government's failure to turn over exculpatory evidence to Petitioner, coupled with the strict application of CIPA procedures, meant that Wilson was never able to demonstrate this in court.

On top of all this, Wilson is now convinced that the prosecution was well aware of much of this information at or before trial. For example, the grand jury examinations of Shackley, Goulding, Clines and others was conducted by the U.S. Attorney's office in Washington D.C. How can the prosecution claim they were not aware of that evidence?

Another example occurred at one of Petitioner's later trials, in Houston, Texas. In that instance, the prosecution sought to limit the exposure of CIA assets by introduction of an affidavit of Charles A. Briggs, then Executive Director of the CIA. In that document, Briggs explained under oath, at Paragraph 4, that:

> According to CIA records, with one exception while he was employed by Naval Intelligence in 1976, Mr. Edwin P. Wilson was not asked or requested, directly or indirectly, to perform or provide any services, directly or indirectly, for CIA.

Thereafter, following Petitioner's conviction in Houston, U.S. Attorney Daniel K. Hedges wrote to Mark M. Richard, Deputy Assistant Attorney General concerning the above-quoted statement by Briggs. In his letter, Hedges noted:

> The evidence is uncontested that Wilson continued to have contacts with past and present CIA officials, such as Shackley and Clines. In the context of the trial, it is hard to imagine how the term "services" could have been interpreted by the judge, jury or even defense counsel to mean anything other than providing intelligence. If the CIA feels that any of the contacts with Wilson, other than the one exception noted in the affidavit, constitutes asking for or receiving intelligence, then the affidavit may be accurate.

It is hard to imagine a clearer situation of prosecutorial misconduct than this admission that a CIA official may

have provided a false affidavit as part of a criminal trial, yet nothing was ever done to correct it. Unquestionably, officials at CIA and the Department of Justice were privy to a great deal of information they took great pains and risk to avoid divulging to Petitioner.

The obligation of the prosecution to produce exculpatory information, rooted firmly in the Constitution, is both continuing in nature and broad with respect to the sources from which a prosecutor is obligated to secure favorable information and turn it over to the defense. For example, in United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992), an appellate panel found a duty of the prosecution to search "files maintained by branches of government 'closely aligned' with the prosecution. In this case, that would certainly include both the FBI and the CIA. This approach was recently affirmed in United States v. Boyd, 833 F.Supp. 1277 (N.D.Ill. 1993), involving the El Rukn gang prosecution. In that case, the District Court held that the obligation to search for favorable evidence extended not only to the prosecutors' files, but also covered "police officers, federal agents and other investigating personnel who participated in the investigation". (at 1353). See also United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989).

This aspect of the case is of special importance to Petitioner. The prosecution was clearly aware of certain exculpatory evidence, some simply because of the fact they directly obtained it. While there is some question as to whether this failure was inadvertent or purposeful, the Hedges episode noted above suggests that it was the latter.

More importantly, however, is that it appears that the prosecution also knew that evidence presented at trial was false. Petitioner should be entitled to undertake further discovery and to have an evidentiary hearing.

C. THE EXCULPATORY EVIDENCE DENIED PETITIONER ESTABLISHES HIS INNOCENCE AND SUPPORTS HIS GOOD FAITH DEFENSE AND ENTRAPMENT BY ESTOPPEL DEFENSE.

The exculpatory material which was not provided to Petitioner clearly supports his "good faith" defense and, alternatively, suggests that a defense of "entrapment by estoppel" could have been successfully raised at trial, had Wilson had all of the facts available to him.

Many federal Circuits, including the Fourth, accept the notion of a "good faith" defense in the context of a criminal prosecution, see United States v. Miller, 658 F.2d 235 (4th Cir. 1981) (defendant could show that he acted in good faith reliance upon the express instructions of a government official possessing authority to do so); see also United States v. Barker, 546 F.2d 940 (D.C. Cir. 1976).

In its decision on Petitioner's direct appeal following conviction, the Fourth Circuit concluded that Wilson had failed to produce evidence that "he had ever been expressly or impliedly authorized by government officials to export firearms illegally, 721 F.2d 967, at 975.

It is now clear, following receipt by Wilson of exculpatory information under FOIA, that Wilson was

authorized to seek and obtain weapons from Middle East sources turn over to U.S. intelligence officials. This is borne out in the Shackley grand jury testimony noted above, where the CIA had an interest in locating sources of American weapons, including M-16s, which had been captured by the North Vietnamese. It is very plausible that Wilson's claim to have been tasked by Shackley to pursue this objective is true and that Shackley had to authority to task him.

The remaining question, therefore, is, assuming that the actions of shipping firearms without proper export permits was illegal (but necessary to provide "cover" to support an authorized objective), did Shackley have authority to order the illegal act, or more pointedly, did Wilson have the right to assume that the use of illegal methods to accomplish an authorized intelligence-related task was OK. The answer is an unqualified yes.

First, the acts complained of in Wilson's Alexandria prosecution occurred before 1979. Prior to that, Wilson had been employed by CIA from 1955 to 1970 and by Naval Intelligence from 1971 to 1976. He worked extensively within a culture of intelligence which often condoned the use of unlawful means to achieve what many believed to be laudatory objectives. In fact, in 1976, the Senate Select Committee on Intelligence ("Church Committee"), in its Final Report, noted that the Committee had developed a strong record of unlawful acts carried out by intelligence officials, but noted at Book I, page 2, that:

The Committee is of the view that many of the

unlawful actions taken by officials of the intelligence agencies were rationalized as their public duty. (emphasis added)

Nonetheless, the Committee went on to note that "the pursuit of the public good could have the opposite effect. (at 2)

Second, prior to promulgation of Executive Order 12333 in 1980, the CIA was not specifically precluded from authorizing an illegal act. E.O. 12333 provides in Part 2.8 that "nothing in this Order shall be construed to authorize any activity in violation of the Constitution or statutes of the United States", but not such direct prohibition existed prior to 1980, and many illegal activities were sanctioned.

United States v. Lopez-Lima, 738 F.Supp. 1484 (S.D. Fla. 1990) is instructive. In that case, the defendant argued that he had real authority to hijack an aircraft to Cuba in 1964. Citing the Church Committee Final Report, the District Court found that E.O. 12333 altered the practice of condoning illegal acts which had existed prior to 1980 and it went on to find that 1) prior to 1980, CIA had authority to order the illegal hijacking of an aircraft, 2) those persons who authorized the hijacking were real CIA assets, 3) the lack of a written record at CIA did not defeat the use of a "good faith defense, 4) the defendant could rely on the authorization, even if overbroad, and 5) the defense was not defeated even if the CIA asset lacked actual authority.

Wilson's situation compares favorable to Lopez-Lima in all respects and Wilson should be allowed to pursue his "good faith" defense.

Materials obtained by Wilson under FOIA support use of the "entrapment by estoppel" defense, an affirmative defense resting on principles of fairness and due process. It applies in situations where a government official tells a defendant that certain conduct is legal, the defendant relies upon the representation and is subsequently prosecuted for it. United States v. Thompson, 25 F.3rd 1558 (11th Cir. 1994). To support the defense, a defendant must show that 1) he relied upon the false information and 2) that his reliance was reasonable. United States v. Brebner, 951 F.2d 1017 (9th Cir. 1991). See also United States v. Tallmadge, 829 F.2d 767 (9th Cir. 1987) (reliance upon a federally licensed firearms dealer is permissible).

According to facts outlined by the Fourth Circuit in its 1983 opinion following Wilson's direct appeal, Wilson directed two of his associates to obtain the firearms in question. They, in turn, turned them over to Reginald Slocombe, a licensed freight forwarder, who shipped them to Europe (allegedly illegally). What seems clear is that Wilson never specifically instructed Slocombe to ship the weapons in an illegal manner, but only that he wanted Slocombe to get the job done (which he did without obtaining required export licenses).

A freight-forwarder, by definition, is an independent entity from the shipper. Norman G. Jensen, Inc. v. Federal Maritime Commission, 497 F.2d 1053 (8th Cir. 1974).

Freight-forwarders are licensed by the FMC, see 46 U.S.C. App. 1718, and they are bonded. Section 1718(b) also provides for suspension of a license for "willfully failing to comply with...a lawful order, rule or regulation of the Commission".

49 U.S.C. 10102(9) defines a "freight-forwarder" to be a person who, for compensation and in the ordinary course of his business, "(B) assumes responsibility for the transportation from place of receipt to the place of destination." Under these circumstances, it is reasonable to assume that Wilson could rely on the following: 1) that Slocombe knew what he was doing, since he had an FMC license, 2) that he would handle the entire overseas transaction and 3) that he would act legally in doing so, so as not to lose his license.

CONCLUSION

Petitioner herein has filed an application for writ of error coram nobis. He has resorted to this atypical remedy because he has already completed the sentence imposed upon him because of this particular sentence.

Petitioner has sought relief because of a sincere and strongly supported belief that he was denied access to exculpatory material which would have established his innocence. It has taken him nearly 15 years to learn the truth and he seeks justice.

On the other hand, the District Courts rejection of his application without so much as even requiring the United

States to file a reply to Petitioner's allegations, confirmed by the Fourth Circuit, constitutes an abuse of discretion that so departs from the accepted and usual course of judicial proceedings, that it begs for intervention by this Court. The underlying application has merit, is not frivolous, and deserves to be heard.

Respectfully submitted,

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May 1, 1996

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

EDWIN PAUL WILSON

v. Civil Action No. 87-0009-A

UNITED STATES OF AMERICA

FINAL ORDER

This matter is before the Court on petitioner's Writ of Error Coram Nobis filed pursuant to the All Writs provision of Title 28 U.S.C. 1651. The petition is a continuation of a similar action filed in 1987 that was treated as a petition for relief pursuant to Title 28 U.S.C. 2255. After reviewing the 91 page petition and documentation attached in support therof, I find the petition to be without merit and, therefore, dismiss it with prejudice without granting an evidentiary hearing or without requiring the United States to file a response. The reasons for this summary dismissal are that the petition is a complete rehash of issues decided by the Fourth Circuit in the direct appeal and issues ruled on by this Court in the prior Section 2255 action. the Court's ruling on the Section 2255 action was not appealed, even though the petitioner was represented by counsel at that time. A copy of the Court's Order and Memorandum Opinion dated August 8, 1988 is attached hereto as Exhibits A and b.

If petitioner desires to appeal the Court's order, he must file a notice of appeal with the Clerk of the District Court within 30 days after the date of entry of this Order.

It is so ORDERED.

Let the Clerk send a copy of this Final Order to all counsel of record and to the petitioner at his new address.

RICHARD L. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v. No. 94-7322

EDWIN PAUL WILSON,
Defendant-Appellant

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Richard L. Willams, Senior District Judge
(CR 82-212)

Submitted: January 18, 1996

Decided: February 7, 1996

BEFORE Hamilton and Luttig, Circuit Judges, and
CHAPMAN, Senior Circuit Judge

Affirmed by unpublished per curium decision

COUNSEL

Bernard Fensterwald, III, Fensterwald & Alcorn P.C.
Vienna, Virginia, for Appelant. Helen F. Fahey, United
States Attorney,Perry S. Bechky, Special United States
Attorney, Alexandria, Virginia, for Appellee

OPINION

PER CURIUM

Edwin P. Wilson, a federal prisoner, appeals the district courts' dismissal of his petition for writ of error coram nobis, filed pursuant to 28 U.S.C. 1651 (1988), without conducting an evidentiary hearing and without requiring a response from the Government. This petition represents Wilson's second collateral attack on his conviction for federal offenses involving the illegal export of weapons.* The district court found the issues raised in this petition were a complete rehash of those issues previously litigated on direct review and in a prior 28 U.S.C. 2255 (1988) motion.

On direct appeal from his conviction, we rejected Wilson's good faith defense and his claim that the district court improperly excluded classified documents, and affirmed most of his convictions. Several years later, Wilson filed a writ of error coram nobis, which the district court properly treated as a post-conviction collateral attack under Section 2255. Wilson asserted that the prosecution withheld favorable evidence during pre-trial proceedings. After allowing Wilson to supplement the record with additional affidivits and discovery requests, the district court ruled on Wilson's discovery requests and denied the entire motion without an evidentiary hearing. On appeal,

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* A full description of the facts underlying Wilson's conviction can be found in United States v. Wilson, 721 F.2d. 967 (4th Cir. 1983).

we held that Wilson was not entitled to the benefits of *Brady v. Maryland*, 373 U.S. 83 (1963) because he was free to discover the information sought in the preparation for his trial. *United States v. Wilson*, 901 F.2d at 382.

A writ of error coram nobis under 28 U.S.C. 1651(a) (1988) may be issued only where an error of the most fundamental character compels such action to achieve justice, and where no alternate remedy is available. *United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989). This petition does not allege such a fundamental error, and was, therefore, properly denied. We determined on a previous occasion that Wilson did not suffer a violation of the benefits afforded under *Brady*. The information sought by Wilson could have been discovered through reasonable diligence. His inclusion of the sought material in the record on appeal only tends to prove that he could have obtained this information earlier.

To the extent that Wilson raises claims that were not addressed by this court in either his direct appeal or Section 2255 motion, such as his claims of erroneous jury instructions, prosecutoraial misconduct and ineffective assistance of counsel, they are all based on errors that allegedly occurred during the course of Wilson's criminal trial. Because he had knowledge of these errors at the time he filed his direct appeal and his Section 2255 motion and failed to raise them at that time, this petition does not meet the exceptional circumstances to warrant coram nobis relief. See *United States v. Keane*, 852 F.2d 199, 202 (7th Cir. 1988) (claims that could have been raised by direct

appeal are outside scope of writ of error coram nobis), *cert. denied*, 490 U.S. 1084 (1989).

Finally, the district court did not abuse its discretion in dismissing Wilson's petition for writ of error coram nobis without an evidentiary hearing. No hearing is required when the record conclusively shows that the petitioner is entitled to no relief. *Fontaine v. United States*, 411 U.S. 213, 215 (1973). Here, the same judge presided over Wilson's criminal trial, his Section 2255 proceedings, and his petition for writ of error coram nobis. Being familiar with the facts of this case, the sentencing judge could properly dispose of this petition based upon his memory. See *Blackledge v. Allison*, 431 U.S. 63, 74 n.4 (1977). For the foregoing reasons, we affirm the district courts' dismissal of Wilson's petition for writ of error coram nobis.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED